T 34

D 12.10:

Handling Federal Sector 3rd Party Cases

By

Office of Technician Personnel
National Guard Bureau

TABLE OF CONTENTS

Preface		v
Introduction		vii
Chapter 1	The Charge and the Investigation	1
Chapter 2	Complaints	6
Chapter 3	Hearing Preparation	9
Chapter 4	Before The Hearing	14
Chapter 5	The Hearing	16
Chapter 6	Post Hearing	23
Conclusion		27
Appendix A	FLRA Form 22	28
Appendix B	FLRA Form 23	30
Appendix C	FLRA Form 75	32
Appendix D	Stipulation of Fact Format	33
Appendix E	Summary of ULP Defenses	34
Appendix F	Guidelines for Management Witnesses	36
Appendix G	Management Post Hearing Brief Format	38
Appendix H	Analysis of Administrative Law Judge's Recommended Decision	39
Appendix I	Exception Brief Format	40
Appendix J	Statement of Service	41
Appendix K	Answer to Complaint	42
Appendix L	Position Statement Format	43
Appendix M	Glossary	44

Preface

This book has been primarily prepared for management's handling of unfair labor practices. Many chapters will also prove useful in arbitration, FSIP, adverse action, and EEOC hearings. It is intended both as a reference and for training management representatives in 3rd party hearings.

Any suggestions or comments covering the material should be sent to the Labor Relations Division, Office of Technician Personnel, National Guard Bureau, 4501 Ford Avenue, Alexandria, Virginia 22302-1454.

February 1989

INTRODUCTION

Since the passage of the CSRA in 1978, 3rd party case handling has become an important element in the labor relations career field, although most labor relations specialists are not attorneys. It is important that these cases be properly handled, researched, and presented.

Handling, researching, and responding to ULP's is expensive. The GAO has estimated that ULP charges cost the Government thousands of dollars each, which does not include "make whole" remedies to rectify an unfair labor practice.

Notwithstanding management's best efforts to meet its legal obligations, it is likely that ULPs will be filed for many different reasons. This book is intended to help management's representative ensure that ULPs are handled in a manner most beneficial to agency management.

HANDLING FEDERAL SECTOR 3RD PARTY CASES

Chapter 1

The Charge and the Investigation

1-1. Pre-charge. Some negotiated or oral agreements require management and the labor organization to discuss a potential unfair labor practice (ULP) before it is filed with the Federal Labor Relations Authority (FLRA) Regional Director.

In such cases, a management representative with authority to settle should meet with the union, try to get to the meat of the problem, and attempt to settle the matter. Even if settlement is not achieved, helpful information and details are often obtained about the charge that will be useful to management in any subsequent investigation by the FLRA Regional Director.

1-2. Charge (Appendixes A and B). When the charge is received, it must first be determined who will be responsible for handling the case. That person could be someone from the personnel office, the labor relations specialist, an attorney, or another trained individual. It is important to pick the best person available to represent management in discussions with the union and the FLRA and to prepare and present management's case. If the person selected is employed part-time or employed by a law firm, make sure any papers served reach that individual promptly to avoid untimely position papers and briefs. The charge must first be reviewed for procedural compliance with law and the rules of the FLRA:

a. Is it timely? The time limit is six months from the date of the event giving rise to the charge, absent concealment by a party, or failure to perform a duty; e.g., a continuing violation of statute.

b. Are specificity requirements met? For example, time, dates, names, places, statements, and what happened?

c. Was it filed with the appropriate FLRA regional office?

d. Does the charge name the proper respondent(s)? If more than a local activity is named, advise others charged.

e. Is it signed and dated?

f. Is it a ULP? Should the matter have been processed under the negotiated agreement as a grievance? Is the matter pending in other

forums; e.g., in arbitration, before the Federal Service Impasses Panel (FSIP), or the FLRA as a negotiability question? Under 7116(d) of the statute, identical issues cannot be pursued simultaneously in both the ULP forum and arbitration. The date of filing is the key factor in determining in which forum the charging party has elected to process the allegation.

g. Has the same or similar charge been previously filed or dismissed?

1-3. Investigation. Management's representative should promptly investigate the charge, since the Regional Director will ask for a written position statement.

a. Find out if the charge is factual.

b. Find out why management acted as it did.

c. Gather all relevant documents, memoranda, and policies related to the charge, and authenticate originals.

NOTE: Unfortunately, the union is not required to furnish management the attachments to the charge that were submitted to the FLRA.

d. Review case precedent of both the FLRA and circuit courts, and, if necessary, the private sector.

e. Interview (preferably in person) management officials involved and prepare a summary of the interview (you may tape it) to include facts, findings, and any problems that may have surfaced. Never interview a witness before you understand the issue(s) raised by the charge.

f. Consider interviewing other employees; e.g., those in the bargaining unit. (Interview can be done after receipt of the complaint.) Interview bargaining unit personnel under the guidelines set forth in *Brookhaven* to avoid any interference with protected employee rights.

(1) One designated management representative should do the interviewing.

(2) Interview each person individually.

(3) Interview privately away from the employee's work site and away from other supervisors and employees.

(4) Inform the individual of the purpose(s) of the questioning.

(5) Advise the individual that his or her participation is voluntary and ask for his or her voluntary participation. (Terminate the interview if the individual will not participate.)

(6) Advise the individual that there will be no reprisal for refusal to participate in the interview.

(7) Confine questions only to the issues stated in the charge.

(8) Do not let the questions threaten or intimidate.

(9) The questioning must not interfere with employee rights to organize, engage in union activity, or be represented by a union.

NOTE: An interview conducted under these guidelines may still constitute a formal discussion under 5 USC 7114 if the criteria are met.

1-4. Settlement with the union. The parties have 15 days from the filing of the charge to informally resolve it before the Regional Director initiates an investigation. There are several considerations before initiating settlement discussions with the union. For example:

a. The facts of the case, strength and weaknesses of management's case, past practices, strength of witnesses, and contractual terms.

b. Relevant case precedent.

c. The potential for settlement--what would the union want? Consider potential settlement terms versus the likely remedy if the case were to be lost.

d. Consider the impact and precedence of a decision against management. Willingness to settle is not evidence of violative conduct nor is it admitted into evidence by the ALJs.

1-5. Statement of Position. Normally, the Regional Director will ask for a written statement of management's position relative to the charge after the 15-day settlement period. Management need not repond but should do so to place its views squarely before the Regional Director. (see appendix E for a summary of management ULP defenses.) The written response should be promptly submitted to the Regional Director (see appendix L). It need not be served on the union. The position statement must be carefully written as it will (1) become part of the hearing record if a complaint is issued or if the general counsel moves for a temporary restraining order (TRO), (2) could needlessly trigger amended charges, and (3) could cause an on-site investigation broader than the charge.

a. State the facts and your position clearly. Avoid ambiguity and repetition.

b. Furnish all relevant and releasable information (policy, memoranda, minutes of meetings, etc.). Sanitize as necessary. If the information is not releasable, summarize the information and furnish the written summary to the Regional Director.

c. Offer to meet with the Regional Director. One distinct advantage of such a meeting is to get a "feel" for the General Counsel's position even if settlement (partial or total) is not achieved.

d. Designate management's representative on FLRA Form 75 (appendix C).

1-6. Ex Parte Communications. Routine inquiries regarding the charge are proper, and they help to establish contact with the Regional Director's office.

1-7. Regional Director's investigation of the charge. Interviews are routinely conducted with bargaining unit personnel. The Regional Director should be advised to arrange for such interviews in advance to avoid workload problems, scheduling, etc. by contacting the representative designated on FLRA Form 75. Bargaining unit employees must be made available on official time. Management has no right to be present at these interviews nor to limit the official time for such interviews. When several employees are being interviewed, the interviews should be scheduled at intervals to avoid wasted work time. Private space should be provided to the investigator for the interview. Any statements or affidavits given by unit employees constitute protected activity under the statute and are not furnished to management.

Management officials and supervisors being interviewed by the Regional Director should always be represented by management's representative. Management may decline to make its officials available; however, doing so usually works against management's interests since its views are not presented to the Regional Director. The interview is an excellent opportunity to provide information (policy, memoranda, etc.) and to tell what happened to the Regional Director using management witnesses. Generally, affidavits are prepared by the FLRA investigator at the conclusion of the interview based on the investigator's notes of the interview. Ensure that any affidavits signed by management officials are accurate since they may be used for cross-examination by the general counsel in the event of a hearing. If time is needed to review the affidavit, it may be mailed to the Regional Director after the interview. The Regional Director has no right to release the affidavits of management officials to labor organization representatives. If the affidavit is released to the labor organization, and management becomes aware of it, the credibility of the witness called by the general counsel should be challenged on cross-examination (see 5-11).

1-8. Settlement with the Regional Director. Up to this point, settlement is much easier to achieve than later. An offer of settlement can be initiated by any party either orally or in writing. Management may negotiate settlements with the Regional Director to include length of notice posting (if any), disclaimers, content of notices to employees, etc. Any settlement reached (other than partial settlement) should result in the written withdrawal or the dismissal of the charge. Settlement terms should be carefully evaluated in light of the following criteria:

a. Existing past practices and working conditions.

b. Negotiated agreements.

c. Effect on work performance.

d. Likely effect on future negotiations.

e. Possible effect on other bargaining units.

Since offers of settlement have no relevance in ULP hearings, attempts to settle usually work to management's benefit. Settlement agreements are enforceable via the ULP procedures absent waiver of enforcement rights by the parties.

Chapter 2

Complaints

2-1. Complaint and notice of Hearing. Once issued by the Regional Director, management's representative will know:

a. The issue(s).

b. Who is involved. This is a key indicator of those employees who will be subpoenaed by the general counsel.

c. The events giving rise to the complaint and what the alleged violations of 5 USC 7116 are.

d. The facts upon which FLRA jurisdiction is predicated.

e. The date, time, and place of the hearing.

f. Whether or not the case is on a calendar call.

g. Date by which management's answer to the complaint must be received by the Regional Director.

2-2. Issue Identification. At this time, management's representative must precisely identify the issues. Only by the careful and precise identification of the issue(s) can management's representative ensure that: (1) the agency's position is not hidden as the result of irrelevant argument and testimony; (2) only relevant testimony is presented; and (3) the introduction of relevant exhibits is presented logically. Furthermore, management's representative will have difficulty establishing a case theory or documented defense if the issues are not properly framed.

There exists ample case precedent on the aspect of issues. For example, if an issue is not raised in the complaint, it is considered waived.[1] However, if an issue not encompassed by the complaint is litigated at the hearing, the FLRA will rule on it. If issues not stemming from the charge are raised in the complaint, management should file a motion to dismiss with the Regional Director since the issues raised are

[1] A complaint can be amended at any time by the general counsel (even at the hearing) to cover issues encompassed by the charge. The ALJ will most likely grant the motion for amendment if it is based on the charge and the respondent was apprised of the amendment. Management's representative should move for a recess or postponement of the hearing in order to prepare an amendment to the answer, to secure needed witnesses and documents, or to further research the new issue(s).

not based on the charge; therefore, the FLRA has no jurisdiction to rule on them. Furthermore, a complaint cannot be amended to include issues previously dismissed or dropped.

2-3. Response. The answer (appendix K) to the complaint must be filed by the date specified in the complaint.[2] All of the allegations in the complaint must be either admitted, denied, or explained. If without knowledge, management's representative should so state. The answer is filed by certified mail and served on all parties (see appendix J). It need not be detailed; however, in many cases a detailed answer is to management's benefit becase it gives background on an issue and ensures that facts are on the record, which is part of the hearing record. This is especially true where managements' representative is unsure of a witness's credibility or knowledge of an event. Like the complaint, the answer can be amended anytime, even at the hearing.

2-4. Evaluation. Management's representative must evaluate the need for motions, such as:

a. Motions related to the complaint; e.g., improper respondent or motion for postponement.

b. Taking of depositions.

c. Sequestration of witnesses.

2-5. Stipulation. The case should also be evaluated toward the possibility of stipulating the case in lieu of hearing where the case facts are not in dispute.[3] The general counsel shoud be promptly contacted if stipulations are feasible (see appendix D). Stipulations (including exhibits) must be carefully drawnup to include all events and facts, as briefs and argument are limited to the scope of the stipulations. Stipulations, if agreed upon with the general counsel, are normally prepared by the general counsel with the concurrence of management's representative and the union. The union's concurrence is obtained by the general counsel.

If the case is stipulated, briefs will be due at the FLRA 30 days from the date the Regional Director transfers the case to the FLRA unless other agreement is reached. Transfer normally occurs four to eight weeks after stipulations are agreed upon. Court review of the FLRA ruling in a stipulated case is still available.

---

[2] If the answer is not timely filed, management's representative may still be able to avoid summary judgment by promptly advising the general counsel of management's defenses, showing by fact and argument that the defenses are meritorious, and explaining why the untimely answer was not prejudicial to the general counsel's prosecution of the case.

[3] A stipulated case can still go to hearing in certain circumstances; e.g., where *amicus curiae* status is granted a person(s).

Even if the case is not stipulated in lieu of hearing, the general counsel should be contacted to ascertain if there are case facts that are not in dispute that can be stipulated. Time and money is saved by stipulating to the case facts that are uncontested.

Chapter 3

Hearing Preparation

3-1. Hearing Brief (Trial Outline). The preparation of a hearing brief is essential to the presentation of the case. Its preparation begins after the complaint is received. The brief should be comprehensive enough that another individual could step in at the last minute and present the case if that becomes necessary. The following is included in the brief:

a. In presenting the case, a precise statement of the issue(s) written in a format in which management's representative is most comfortable. The issue(s) stem from the complaint.

b. Management's theory of the case in terms of why the allegations in the complaint do not constitute statutory violations. The ALJ may ask for management's theory at either the pre-hearing conference or at the hearing.

c. An opening statement in narrative or outline form. The statement should not be read even if it is prepared in narrative form. The reading of an opening statement usually creates a wrong impression with the ALJ and may cause the ALJ to interrupt while the statement is being read. Also, reading the opening statement will detract from eye contact with the ALJ. The statement, although usually brief, should identify management's position on each issue, state what is to be proved, and lay a foundation for the testimony of management's witnesses. Opening statements are not evidence. Do not argue your case in the opening statement.

d. A listing of exhibits (with index) and witnesses, which are exchanged at the pre-hearing with the ALJ, the general counsel, and the union. You will need four copies of each exhibit. If only a part of a policy or matter is used, have it certified. When using portions of a document, have the entire document available in case the ALJ wishes to review it or to authenticate those portions being offered into evidence.

e. Preliminary motions to be made with a brief statement in support of each; e.g., a motion for sequestration or closing the hearing to the public.

f. Written stipulations that have been reached with the general counsel.

g. The order in which witnesses will be called, a set of questions for each (which you have gone over with them), their expected testimony, and a signed and dated copy of any statements or affidavits they have made. Attach to the questions for each witness the exhibits (four copies each) that will be introduced via that witness. Be prepared to revise your questions and the order in which they are asked to take advantage of any testimony produced by the general counsel. Witnesses may be called in any order; however, they should be called in the order that most logically and clearly presents management's case.

h. A listing of the general counsel's witnesses, their background, expected testimony, whether or not under subpoena, and cross-examination notes.

i. A summary of applicable precedent decisions with the parties indicated, the case number, and date. These are not submitted into evidence since they are a matter of public record. Management's representative should refer to these decisions in the opening and closing statements and, of course, in the post hearing brief. Check to see if the decisions are being reviewed by the courts under 5 U.S.C. 7123.

j. Prepared rebuttal for possible objections from the general counsel.

k. Charts, graphs, and pictures if they will help the ALJ to better understand management's position or to visualize a setting or work environment. Let a knowledgeable witness explain them.

l. Nature of the workforce, units, mission statement, number of unions, contracts, etc. This information will be used to brief the ALJ if needed. It will be required in FSIP hearings.

m. An understanding with the general counsel on the order issues will be presented to the ALJ if there are several issues and overlapping testimony.

n. A draft of the closing statement or outline.

The hearing brief should be placed in a file or binder and indexed. Ensure everything is in the order in which it will be used so that you never have to search through papers. This helps management's representative to concentrate on the hearing testimony, take notes on testimony for cross-examination, and more easily revise the approach to the hearing based on the testimony or ALJ desires.

3-2. Exhibits. You will need four copies of each exhibit: two for the court reporter, one for the general counsel, and one for management's representative. They must be sanitized if they are subject to Privacy Act considerations. Check each exhibit for clarity, completeness, and authenticity. The exhibits will be marked R1, R2, etc. (for respondent) by

the Court reporter, either at the pre-hearing or prior to the opening of the hearing.

3-3. Transcript. Management's representative must contact the USPFO to arrange for a purchase order for the hearing transcript. A transcript is necessary to write the post-hearing brief. Fill out the request form at the hearing and give it to the reporter. The transcript will normally be received by the management's representative 10 to 14 days after the hearing. Care must be taken to ensure the transcript is mailed to an office where people are present during the workweek to ensure work begins promptly on the brief. As an alternative, the hearing transcript may be reviewed at the FLRA Regional Director's office at no cost.

3-4. General Counsel Witnesses. (See 3.1(h)) The general counsel's witnesses, who are usually bargaining unit personnel, normally appear under subpoena. Official time must be granted for all necessary time that is within their normal work hours. Travel and per diem is payable by management when travel is required. The subpoena is usually sent to the home or worksite of the witness. Management may not be aware of the subpoena until the witness asks for excusal from work. Management must arrange for these witnesses to be at the hearing either before the scheduled time of the hearing or for the necessary period in which they are expected to testify, including the time required to testify as a rebuttal witness. If necessary, duty hours can be rearranged to accommodate the hours of the hearing. Witnesses can be required to return to work after testifying unless they are subject to recall. Their normal work attire is the attire for the hearing absent unusual circumstances. Witnesses cannot be required to take annual leave or compensatory time.

3-5. Management Witnesses. The hearing is normally held in a court room or a Federal building. It is often difficult to say when management witnesses will be called, since the case may be one of several to be heard by the ALJ. It is a good idea to provide a room or other space near the hearing site to assure their availability when needed. This also provides another opportunity to go over their testimony and to add testimony based on the general counsel's case in-chief. All Federal employees receive official time, travel, and per diem when serving as witnesses for management or the General Counsel. Witnesses who are not Federal employees receive fees pursuant to 28 USC 1821 by filing SF 1157, Claim for Fees and Mileage of the Witness. Mail this form to the witness appearing on behalf of management prior to the hearing.

3-6. Subpoenas. A subpoena to appear at the hearing may be requested by the general counsel or management's representative. The request shoud be filed in writing with the Regional Director or ALJ at least two weeks prior to the hearing.

3-7. Contents. The request for subpoena must:

a. Identify the witness and/or document sought.

b. State specifically the reasons for the subpoena.

c. Give grounds for approval.

3-8. Service. The party requesting the subpoena is responsible for its service on all other parties.

3-9. Revocation. Any person served with a subpoena may petition for its revocation. This must be done within 5 days from the date of service. The petition is served on all other parties. It may be revoked if:

a. Evidence that would be produced does not relate to the issues in the complaint.

b. The subpoena lacks specificity.

A petition to revoke a subpoena, all answers thereto, and the ruling is not part of the official record except upon the request of the aggrieved party.

3-10. Enforcement. Subpoenas are enforceable in district court if the general counsel seeks enforcement.

3-11. Scope of Subpoena. The general counsel has no legal right to direct subpoenaed employees to help prepare their case unless the time to do so and the reasons are precisely identified in the subpoena.

3-12. Depositions. Depositions are used in the place of witnesses. An ALJ may take, or order the taking of a deposition. The criteria for a deposition is that the ends of justice would thereby be served.

3-13. Guidelines. A signed and dated application for deposition should be made to the Regional Director stating:

a. Why the deposition should be taken.

b. The name and address of the witness.

c. What testimony the witness is expected to give.

d. The proposed time, date, and location for the taking of the deposition.

3-14. Service. Service of the deposition application is made on all other parties.

3-15. Order. An order will be issued by the Regional Director or ALJ on the application for the deposition.

3-16. Taking of Deposition. Depositions are taken under oath before an officer who can administer oaths.

a. All parties have the right to examination and/or to cross-examine the witness.

b. All parties have the right to object to questions. Objections are noted by the officer administering the deposition.

3-17. Formality. The witness may sign the deposition after it is typed.

3-18. Rulings. The ALJ will rule on the admissibility of the deposition when it is offered into evidence.

3-19. Motions. Either party may make a motion for repression of all or parts of the deposition.

3-20. Interrogatories. Responses to interrogatories may be ordered by ALJs unless the privacy of the general counsel sources of information would be affected.

Chapter 4

Before the Hearing

4-1. Management Witnesses. Your contact with the witnesses up to this point should have prepared them for their testimony. You have discussed the charge and the events giving rise to the charge with them in the investigative stage; had pre-hearing discussions with them; and have gone over their testimony individually when you drafted their questions.

4-2. Witness Preparation. It is essential that all witnesses know six things:

- Their testimony and how you are going to elicit it (question and answer approach or just let them tell their story).
- How their testimony relates to the issue(s), other testimony, and exhibits.
- That their testimony will be under oath and must be truthful even if portions of it are detrimental to the outcome of the case.
- That they are subject to cross-examination by the general counsel, ALJ questioning, and perhaps questioning by the union's representative if the union has intervened.
- That they may be sequestered and should remain near the hearing room.[4] Tell them it may be a long wait!
- That they usually may not use notes when testifying.

4-3. Witness Briefing. Go over, with each witness, the guidelines for witnesses or give each a copy (appendix F). Emphasize that questions should be answered briefly and clearly, tell what you know, do not volunteer inferences and opinions, and be polite. Let your counsel object to questioning if necessary.

4-4. Management's Representative. Before getting into the details of the hearing, a few observations should be made. Before you walk into the hearing room, you should:

- Know your case, the issues, applicable precedent, and the rules of the FLRA at 5 CFR 2423.

---

[4] Sequestration may occur on the motion of either party.

- Have a complete understanding of the general counsel's case, evidence, and witnesses. You cannot counter the General Counsel's contentions if you do not understand them.
- Make sure your co-counsel (if one is used) knows who is responsible for direct examination, cross-examination, motions, ALJ questions, the opening statement, and ordering the transcript.
- Review the formal papers (see 5.5). Be prepared to object to any documents that are irrelevant.
- Have a complete trial outline and four copies cf each exhibit to be offered into evidence.
- Have four copies of a list of witnesses and exhibits with an index.

4-5. Demeanor. A few comments on hearing demeanor:

- Do not object unnecessarily as you will only irritate the ALJ.
- Try to speak in a conversational tone but loud enough for the court reporter and ALJ to hear you.
- Avoid overly repetitious testimony unless witness credibility is involved or hearsay is the only evidence. Nothing irritates an ALJ more than hearing the same uncontested testimony over and over.
- Arrive 10-20 minutes before the scheduled time of the hearing and/or pre-hearing.
- Keep your eye on the ALJ. Stand up or walk around when asking questions to keep his or her attention. A little humor does not hurt, but do not overdo it.

Chapter 5

The Hearing

5-1. Hearings. ULP hearings are open to the public unless otherwise ordered by the ALJ. These hearings often generate the interest of newspaper reporters and/or local TV networks in some areas.[5] You should be prepared to let them know what the issues are, what your position is, and the reasons therefore if you are interviewed. If management desires a closed hearing, a motion should be filed with the ALJ prior to the hearing date.

5-2. Calendar (docket) Calls. The case may be on a calendar call, meaning the exact time and date of the hearing is unknown. This poses witness scheduling problems, which must be handled. A good method to employ is having a person in the hearing room with instructions to call the management's representative when the prior docketed case enters the final stages. Be prepared to handle docketing problems such as waiting, rearranging travel schedules, etc.

5-3. Pre-Hearing Conference. The actual hearing will normally be preceded by a pre-hearing conference.[6] The ALJ may inquire about management's position and ask if any settlement potential exists. Be prepared (also have the authority) to enter into settlement discussions at the pre-hearing. The pre-hearing is a good opportunity to tell the ALJ your side of the story (if the ALJ asks for it) and to advise the ALJ of any hearing problems, stipulations, joint exhibits, etc. The general counsel and mangement will exchange witness and exhibit (with index) lists at the pre-hearing. Two copies of each list are furnished to the ALJ and one copy to the general counsel. Any objections concerning these lists are made on the record after the hearing opens.

5-4. Intervernors. A union representative may be granted intervenor status by the ALJ. However, the general counsel has the burden of proof and the responsibility for presenting evidence in support on the allegations in the complaint. There is usually little or no reason to object to the union as an intervenor. An intervenor may participate in the hearing, including the cross-examining of witnesses.

---

[5] Especially in union animus cases where protected rights are involved.
[6] The pre-hearing conference is not on the record.

5-5. Formal Papers. The general counsel will move the formal papers into evidence early in the hearing. These should have been reviewed before the hearing and before stating that there is no objection to them. These papers primarily consist of:

a. The charge.

b. Management's position statement.

c. The complaint (and any amendments).

d. The answer (and any amendments).

e. Joint stipulations between the General Counsel and management's representative.

5-6. Stipulations. Agreed upon relevant facts are introduced into the record in the form of a stipulation (see appendix D). The stipualtion may be introduced as a joint exhibit or read into the record, normally by the general counsel. Where facts are not in dispute, a stipulation should always be used to save hearing time, money, and to confine the hearing to the issues. The general counsel and management's representative should have the stipulation ready for introduction when the hearing opens.

5-7. Opening Statement. The general counsel will give his or her opening statement first. Management's representative should give a well-prepared and concise statement and should not normally waive the right to an opening statement. Do not attempt to argue your case in the opening statement. Tell the ALJ your position on the issues and what you intend to prove. If the statement is read, a copy is not furnished the other party nor is it entered into evidence.

5-8. Motions. Motions can be made in writing or stated orally on the record. Adverse rulings (overruled motions) by the ALJ are automatically reviewed by the FLRA. Management represeniatives should expect motions to intervene by union representatives and motions to sequester, which are routinely granted by ALJs. Motions to amend the complaint are the most troublesome, since management's representative may not be prepared for the amendment. Do not hesitate to ask the ALJ for a recess or a postponement to consider the amendment, to secure witnesses, to prepare an answer to the amended complaint, or to prepare testimony. Motions to dismiss the complaint are appropriate and should be prepared in advance. Motions for summary judgment should be made on the record whenever management has reasonable proof that the General Counsel has not met the burden of proof.

5-9. Burden of Proof. It always rests with the general counsel. The general counsel must prove by a preponderance of the evidence that

management committed the unfair labor practice(s) as alleged in the complaint. Preponderance is defined as:

> such relevant evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than not.

Notwithstanding the counsel for the general counsel's burden of proof, the management's representative must be prepared to put forth the same standard of evidence in mixed motive cases; i.e., where union activities (protected activity) may have played a part in an action against an employee but the action would have occurred anyway for other reasons. This burden arises after the general counsel has proven that the employee(s) engaged in protected activity, that management had knowledge of the activity, and that management retaliated against the employee because of the union activity. Management's representative must then prove by a preponderance of the evidence that the action taken against the employee would have occurred even absent protected activity.

5-10. Evidence. The rules of evidence do not apply. Any evidence may be received unless it is determined by the ALJ to be immaterial, irrelevant, repetitious or privileged. All evidence offered should be confined to the issues to avoid appearing unprepared, disguising the issue(s), or being misinformed as to the issue(s). Keep in mind that evidence is subject to objection by the general counsel. If an objection to evidence is raised, you will be asked by the ALJ to state why the evidence offered should be accepted. Evidence can take many forms--testimony, charts, graphs, contracts, written policies, and authoritative opinions if they are relevant to the resolution of the issue(s). Management's representative is responsible to determine the form of evidence, what is submitted, and how it is submitted.

Always present the best evidence available. Here are some general observations on evidence:

a. Failure to use a knowledgeable witness (or a document, policy, or a regulation) creates an adverse inference against that party. Silence on a matter can be persuasive evidence.

b. Testimony of an individual will not be allowed if it is conditioned upon non-disclosure of the testimony.

c. Allegations, assertions, and the opening statement are not evidence. Opinions may be, if a foundation can be laid for the testimony; e.g., an expert witness.

d. Evidence gathered by improper means such as illegal surveillance or search is not admitted.

e. Lie detectors are given no weight but could be corroborating evidence if the employee agreed to the polygraph.

f. Evidence gathered or received after to the hearing is normally not admitted unless prior unavailability is excused by the ALJ. You cannot argue in a brief that which was not produced at the hearing except for new legislation, Executive Orders, and implementing policies.

g. Evidence outside of the 6-month timeframe for the filing of a ULP is not probative but may be used for background or to shed light on the issues.

h. Affidavits are normally not allowed into evidence, unless it can be shown that the witness was not available under any circumstances. However, telephonic affidavits are admissible since the other party has the opportunity to cross-examine.

Hearsay evidence alone will not meet the general counsel's burden of proof. The probative value of heresay is based on seven factors. They are:

- The availability of witnesses with first hand knowledge.
- Whether or not the hearsay statements were signed in an affidavit form.
- The reason(s) for not having signed and sworn statements.
- Any personal interests of the person signing the hearsay statements (if signed).
- The consistency of hearsay statements.
- Whether or not hearsay statements are corroborated by other witnesses or testimony.
- The credibility of the witness (see page 23) considering the time and place the statement was made.

If hearsay evidence is contradicted by credible witnesses, it will not be probative.

5-11. Cross Examination. As in most types of 3rd party hearings, the general counsel, as the moving party, presents its case first by witness testimony and the offering of exhibits. Each witness is subject to cross-examination by counsel for the respondent (management's representative). Most advocates agree that management should prove its case with its own witnesses. However, cross-examination should be used where there is predictable and beneficial testimony that can be obtained, to impeach a witness, to bring out conflicting witness testimony thereby raising credibility questions, or to obtain favorable factual admissions. Never cross-examine a witness that has little or no bearing on the outcome of the case or if you have no idea what the

answer will be. Counsels for the general counsel have won many cases (especially borderline ones) simply because management cross-examined a credible witness who testified to the same facts or in the same way as he or she did on direct examination. Before cross-examination, doublecheck your notes on the direct testimony of the witness. Be convinced that cross-examination is really called for and that the testimony is likely to benefit management's case.

Care must be taken when questioning a witness on cross-examination. Start by confirming what the witness said. Then, ask the witness *very* specific questions designed to elicit yes or no answers. Asking broad questions based upon a witness's direct examination only allows the witness to repeat and reinforce his or her direct testimony, and you may find yourself unable to stop the witness from testifying. Nothing is more detrimental to your case than opening the door for a credible witness for the general counsel to tell his or her story all over again! Once a bad question is asked, it will be almost impossible to prevent the witness from answering.

Normally, a general counsel bargaining unit witness has signed an affidavit for the general counsel. For purposes of cross-examination, it is proper to ask the witness after direct examination if he or she has signed such an affidavit and, if yes, to ask the ALJ for time to review it. This is referred to as the Jenks Rule, which entitles respondent's counsel to review an affidavit before cross-examination. Before cross-examining based on the contents of an affidavit, ensure that a foundation is laid by asking the witness if it was his or her affidavit and if it was executed on the date indicated. The affidavit of a general counsel's witness may be offered into evidence by management's representative if it supports management's case.

If a statement is shown to a witness by the general counsel, management's representative is entitled to see it before it is given to the witness. Always ask the ALJ for a brief recess to prepare your cross-examination, if necessary. The testimony of bargaining unit members is protected activity, which must be remembered during cross-examination and after the hearing.

After cross-examination, counsel for the general counsel is entitled to re-direct examination. Upon completion of the re-direct, management's representative is entitled to further cross-examination, if desired.

5-12. Objections. When considering an objection to a question, keep in mind that the rules of evidence do not apply and that an objection not made is waived. Objections should always be used to prevent improper or harassing questioning of management witnesses, to challenge irrelevant questions, hearsay testimony, questions asked without a foundation, and general counsel assertions of fact posed as quasi-questions, or to prevent the general counsel from speech-making or testifying as if he or she were a witness. State your objection

immediately after the question is asked and loud enough for the ALJ to hear it.[7]

5-13. Offers of Proof. If the ALJ rules to exclude evidence that the management representative deems competent and material, an offer of proof should be made. The offer is a written or oral statement that if the witness were permitted to testify in the matter excluded, the witness would testify to the relevant facts.

5-14. Introduction of Exhibits. (See 3.1d and 3.2) Four legible copies of exhibits are required; two copies for the ALJ and one for the general counsel and management. Prior to introduction, documents are marked by the court recorder as respondent, R1, R2; general counsel GC1, GC2; etc. One copy of the marked document is first given to counsel for the general counsel. It should then be shown to the witness for identification and authentication by asking the witness if he or she wrote the document, received the document, etc. Once identified and authenticated, the exhibit is offered into evidence. Exhibits may also be offered into evidence as joint exhibits.

Be prepared to state why the document should be accepted into evidence if counsel for the general counsel objects to its admission.

5-15. Custody of Exhibits. Exhibits that have been received into evidence and those placed in the rejected exhibit file (exhibits not accepted into evidence by the ALJ) are retained by the reporter. They may not be released to the parties unless directed by the ALJ. After the hearing is closed, one set of exhibits and the transcript is sent to the ALJ by the reporter; the other set is sent to the Regional Director. Management's representative must ensure that the respondent's exhibit file is complete in order to review the transcript, since exhibits are not part of the transcript.

5-16. Off-the-Record Discussions and Breaks. Do not hesitate to ask the ALJ (not the court reporter) to go off the record to discuss documents, testimony, or any other matter relating to the issue(s) that will benefit your case or witness testimony. Do not ask to go off the record for frivolous reasons. The ALJ may also go off the record to discuss a line of questioning, to pursue with both counsels their approach to the issue(s), or just to remind the parties to keep the hearing moving. Short breaks can be had simply by asking the ALJ for a short recess.

5-17. Tape Relays. You may find it necessary to ask the ALJ to have the reporter read back previous testimony to refresh your memory

[7] When objecting, state your objection and the precise grounds for the objection; e.g., that there was no foundation laid for the question, the question is irrevelant, or the question has previously been answered.

or prepare for cross-examination. If in doubt as to certain testimony, ask the ALJ to have it read back to you.

5-18. Closing Statement. After both cases are presented, counsels for the general counsel and the respondent will be allowed time for oral argument. Management's representative should be prepared to make a closing statement, although one may not be necessary if a post-hearing brief is to be filed. If you make a closing statement, make it meaningful! Address the issues; counter the general counsel's arguments with facts, testimony and exhibits; point out inconsistencies in testimony that are helpful to your case; and cite relevant case precedents that support your position.

5-19. Final Actions. Before the hearing record is closed by the ALJ, the hearing brief (see 3-1) should be checked to ensure that all arguments have been made and that all exhibits have been offered into evidence. Make sure you have a marked copy of all exhibits.

Chapter 6

Post Hearing

6-1. The Post-hearing Brief (see appendix G). A post-hearing brief to the ALJ may be used to replace or augment oral argument or to address issues asked to be briefed by the ALJ. The brief is management's opportunity to argue the issues citing law and supporting case precedent and to differentiate other cases. The brief is written following receipt of the transcript. An original and four copies must be filed within the timeframe established by the ALJ at the hearing unless an extension is granted. If additional time is needed, a request for extension of time must be filed not later than 5 days before the date the briefs are due. It must state the reasons for the extension and the position of the general counsel as to the extension. This can be obtained simply by calling the general counsel. Copies of a request for extension of time are sent to all parties with a statement of service (see appendix J). Service of the brief is made on all parties of record. There are no reply briefs except by permission of the ALJ. The brief should be a comprehensive document citing the parties to the case, the case number, the background of the case, argument on each issue citing law, transcript page and line number; e.g., TR 20, L 4-10, and a request for dismissal of the complaint (see appendix G).

6-2. Transcript. A motion to correct the transcript may be filed with the ALJ (original and two copies). Copies of the motion must be served on the other parties, and a statement of service must be filed with the motion. It is extremely important that all transcript errors be corrected since the ALJ's recommended decision is reviewed by the FLRA and a small typographical error can turn out to be very important.

6-3. Issuance of Decision. After the close of the hearing and the receipt of briefs, the ALJ will issue a recommended decision setting forth his or her findings of fact, conclusions of law, and the reasons therefore. Credibility determinations will be made and a conclusion will be arrived at as to the disposition of the case including, where appropriate, the remedial action to be taken and notices to be posted.[8]

[8] To challenge an ALJ's finding of credibility, it must be shown by a preponderance of the evidence that the ALJ's finding was improper. Factors ALJs consider when assessing credibility are: (a) the witness's opportunity and capacity to observe the event or act, (b) witness character, (c) whether or not there were inconsistent statements, (d) witness bias, (e) consistency of testimony with other evidence, (f) improbability of testimony, and (g) witness demeanor. Witnesses can be credible on one issue but not another one, even in the same case.

The ALJ will serve the decision on all parties. Thereafter, the ALJ will transmit the case to the FLRA.

6-4. Analysis. Within 5 days after receipt of an ALJ's decision, management's representative should prepare an analysis of the decision (see appendix H), which includes:

a. If the case was lost, in whole or part, the reason(s) therefore.

b. Comments on novel or complex legal, regulatory, or policy questions.

c. Comments on any errors or inconsistencies noted or testimony not considered.

d. A summary of the basis for the filing of an exception to include case precedent.

6-5. Exceptions. Management's representative may file an exception (see appendix I) to the ALJ's decision and a brief in support of the exception within 25 days after service of the ALJ's decision, unless an extension of time has been granted. Service of the exception is made on all parties of record. An opposition to an exception or cross-exception with a supporting brief must be filed within 10 days after service of the other party's exceptions. If the ALJ has ruled against management, the FLRA will adopt the ALJ's decision (without precedence), *unless* exceptions are filed.

The exception must:

a. Identify the findings and conclusions of the ALJ upon which the exceptions are taken.

b. Identify that part of the ALJ's decision to which exception is taken.

c. Reference the page and line number of the transcript, (e.g., TR 20, L9) relied upon, state the grounds for the exception, and cite applicable case precedent to include that of the private and public sector.

An exception may also be made to the remedy proposed by the ALJ. For example, if the remedy would interfere with operations, show in your brief precisely how the operations would be hampered and the likely effects.

6-6. FLRA Order. The FLRA will issue an order either to dismiss the complaint in whole or part, find a violation of statute, or remand the complaint to the ALJ to reopen the hearing. If a violation is found, a remedy could include:

a. A cease and desist order to be posted at all facilities.

b. Placing contractual terms in effect, and, in some cases, retroactively.

c. Back pay and/or reinstatement of employees.

d. Attorney fees

e. Other appropriate remedy but not the disciplining of management officials.

6-7. Motion for Reconsideration. A motion for reconsideration of the FLRA order can be filed with the FLRA if extraordinary circumstances can be established. The motion must be filed within ten days of the service of the FLRA order. Such a motion does not stay the order unless so ordered by the FLRA.

6-8. Court Action. If the FLRA rules against management, the FLRA order should be reviewed for possible circuit court action under 5 USC 7123. The circuit court will review the FLRA decision under 5 USC 706, The Administrative Procedures Act. FLRA orders are entitled to deference under 5 USC Chapter 71 and are upheld if supported by substantial evidence; and are not arbitrary, capricious, or constitute an abuse of administrative discretion.

The court will not hear arguments that were not made before the FLRA. However, they may be heard if management raises them in a Motion for Reconsideration (see 6-7). Court action can only be sought by The Justice Department; therefore, court action must be requested through channels to The Justice Department for final approval.

District courts only have jurisdiction over 5 USC Chapter 71 matters if management violates a clear and mandatory provision of law or to grant a temporary restraining order sought by the FLRA after a ULP complaint has been issued.

6-9. Compliance. Management's representative will be asked by the FLRA Regional Director to show compliance with the FLRA order. The Regional Director should be advised that:

a. The case is being reviewed for court action or;

b. The Justice Department has initiated court action or;

c. Told when, where, and how compliance was effected with copies of any signed cease and desist orders attached.

6-10. Stays. Stays of FLRA decisions are rarely sought by The Justice Department. If a union files a ULP charge for noncompliance with a FLRA order, the Regional Director of the FLRA should be promptly informed that the matter is before the appropriate circuit court citing the docket and case number. The FLRA will normally not process such ULPs pending the outcome of the court action.

6-11. Backpay proceedings. If there is a controversy over an order directing backpay, a backpay specification may be issued by the Regional Director. This contains a specification and notice of hearing.

An answer thereto must be filed by management's representative within 20 days after service. The procedures outlined in earlier chapters will then apply.

6-12. Sources of Information. The management's representative has access to many sources of information. Some of these sources are:

a. Commerce Clearing House/Bureau of National Affairs (CCH/BNA) – for all labor law case precedent in the private sector.

b. FLITE – AV926-7531;AC 303-370-7531.

c. OPM regional offices.

d. Agency personnel offices and legal staffs for court and FLRA decisions.

e. Government Employees Relations Report (GERR) reports.

f. Federal Labor Relations Reporter (FLRR) covering circuit court, FLRA, FSIP, and arbitration decisions.

g. NGB-TNL and NGB-JA

CONCLUSION

The key to the handling and presentation of any 3rd party case is preparation. Management's representative must: (a) be prepared to settle the charge at the initial stages of the ULP procedure; (b) have researched case law and the events giving rise to the charge in order to file an answer to the complaint and notice of hearing; (c) have prepared the witnesses, arguments, and exhibits for hearing if the charge and/or complaint cannot be settled.

The handling of ULP cases requires patience. Before the hearing ever opens, numerous discussions will have taken place with counsel for the general counsel. Many "trial balloons" will have been thrown up to obtain the reaction of management's representative; and, many expectations of settlement and favorable stipulations brought on by hours of work will not work out. The settlement of cases is time consuming, and often becomes very frustrating because all parties are rarely ready and willing to settle at the same time. Still, settlement of cases must be pursued, since settlement is far preferable to a decision that management has no role in shaping.

Hopefully, this book will help assist management representatives in preparing their cases and, at the same time, encourage them to be alert to every opportunity to settle cases on acceptable terms.

Form Approved
OMB No. 52-R0002

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
CHARGE AGAINST AGENCY

INSTRUCTIONS: File an original and 4 copies of this charge, together with one copy for each additional charged party named, with the appropriate Regional Director, Federal Labor Relations Authority. *Upon filing the charge, serve a copy of the charge on each party against which the charge is made.* If more space is required for any item, attach additional sheets, numbered according to the item to which they pertain.

A list (including names and addresses) of those upon whom service has been made should accompany the charge.

DO NOT WRITE IN THIS SPACE

CASE NO. NOTE: RD completes after Receipt.

DATE FILED

1. ACTIVITY AND/OR AGENCY AGAINST WHICH CHARGE IS MADE

A. NAME OF ACTIVITY AND/OR AGENCY

B. ADDRESS (Street and Number, City, State and ZIP Code)

C. PERSON TO CONTACT, TITLE OF EMPLOYEES EMPLOYED D. PHONE NO. E. NO.

F. IF CHARGE IS MADE AGAINST AN ACTIVITY, NAME THE AGENCY OF WHICH THE ACTIVITY IS A PART

2. THE ABOVE NAMED ACTIVITY AND/OR AGENCY HAS ENGAGED IN VIOLATIONS OF 5 U.S.C.7116(A), SUBSECTION(S) (1)AND

(List Subsection(s)

3. BASIS OF THE CHARGE. (Give a *clear* and concise statement of the facts constituting the alleged unfair labor practice and the date and place of occurrence of the particular acts.)

4. INFORMATION CONCERNING ALTERNATIVE PROCEDURES USED FOR RESOLUTION OF MATTERS COVERED BY THIS CHARGE HAS THE SAME FACTUAL SITUATION OR ISSUE COVERED BY THIS CHARGE BEEN RAISED –

A. UNDER A GRIEVANCE PROCEDURE? __YES __NO

B. WITH THE FEDERAL SERVICE IMPASSES PANEL, THE FEDERAL MEDIATION AND CONCILIATION SERVICE, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE MERIT SYSTEMS PROTECTION BOARD OR THE SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD FOR CONSIDERATION OR ACTION?
__YES __NO

C. WITH THE FEDERAL LABOR RELATIONS AUTHORITY UNDER THE NEGOTIABILITY PROCEDURE? __YES __NO IF "YES" INDICATE UNDER WHICH PROCEDURE YOU SELECT TO PROCEED (Check one) __ UNFAIR LABOR PRACTICE PROCEDURE __ NEGOTIABILITY PROCEDURE

5. A. FULL NAME OF PARTY FILING CHARGE (If labor organization, give local name and number, national or international, and affiliation, if any)

B. ADDRESS (Street and Number, City, State and ZIP Code)

C. PHONE NO.

6. I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. *WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT* (U.S. CODE, TITLE 18, SECTION 1001). BY (Type or print below the name of the representative or person filing the Charge)

SIGNATURE

ADDRESS (Street and Number, City State and ZIP Code)

TITLE PHONE NO. DATE

Form Approved
OMB No. 52R–0001

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 4 copies of this charge, together with one copy for each additional charged party named, with the appropriate Regional Director, Federal Labor Relations Authority. *Upon filing the charge, serve a copy of the charge on each party against which the charge is made.* If more space is required for any item, attach additional sheets, numbered according to the item to which they pertain.

A list (including names and addresses) of those upon whom service has been made should accompany the charge.

DO NOT WRITE IN THIS SPACE

CASE NO. NOTE: RD completes after Receipt.

1. LABOR ORGANIZATION AGAINST WHICH CHARGE IS MADE

A. NAME OF LABOR ORGANIZATION (Include Organization's local name and number, its national or international, and affiliation, if any)

B. ADDRESS (Street and Number, City, State and ZIP Code)

C. PERSON TO CONTACT, TITLE D. PHONE NO.

2. THE ABOVE NAMED LABOR ORGANIZATION OR ITS AGENTS HAS ENGAGED IN VIOLATIONS OF: __ 5 U.S.C.7116(b), Subsection(s) ____ __ 5 U.S.C. 7116(C)
(List Subsection(s)

3. BASIS OF THE CHARGE. (Give a *clear* and concise statement of the facts constituting the alleged unfair labor practice and the date and place of occurrence of the particular acts.)

4. INFORMATION CONCERNING ALTERNATIVE PROCEDURES USED FOR RESOLUTION OF MATTERS COVERED BY THIS CHARGE. HAS THE SAME FACTUAL SITUATION OR ISSUE COVERED BY THIS CHARGE BEEN RAISED –

A. UNDER A GRIEVANCE PROCEDURE? __YES __NO

B. WITH THE FEDERAL SERVICE IMPASSES PANEL, THE FEDERAL MEDIATION AND CONCILIATION SERVICE, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE MERIT SYSTEMS PROTECTION BOARD OR THE SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD FOR CONSIDERATION OR ACTION?
__YES __NO

5. A. NAME OF ACTIVITY OR AGENCY INVOLVED

B. ADDRESS (Street and Number, City and ZIP Code)

C. PERSON TO CONTACT, TITLE D. PHONE NO. E. NO. OF EMPLOYEES EMPLOYED

6. A. FULL NAME OF PARTY FILING CHARGE (If labor organization, give local name and number, national or international, and affilation, if any)

B. ADDRESS (Street and Number, City, State and ZIP Code) C. PHONE NO.

7. I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. *WILLFULLY FALSE STATEMENTS* ON THIS CHARGE CAN BE *PUNISHED BY FINE AND IMPRISONMENT* (U.S. CODE, TITLE 18, SECTION 1001). BY (Type or print below the name of the representative or person filing the Charge)

SIGNATURE

ADDRESS (Street and Number, City State and ZIP Code)

TITLE PHONE NO. DATE

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

NOTICE OF DESIGNATION OF REPRESENTATIVE

_____

CASE NO.

_____

TO: Regional Director,

I, the undersigned party, hereby designate as my representative in this proceeding, the person whose name and address appears below. Said representative is to be served copies of all formal documents and written communications in this proceeding excepting subpoenas. This designation shall remain valid until a written revocation is filed by me.

_____

Signature of party (please sign in ink)

Representative's name, address, ZIP code (print or type)

_____

Title

_____

Area Code Telephone Number

_____

FLRA Form 75
Rev. 3-80

APPENDIX D

Stipulation of Fact Format

NGB
Respondent
and
Union Local 0000
Charging Party

Case No._____

It is hereby stipulated and agreed by and between the Agency, Union and Counsel for the General Counsel that:

I

a.
b.
c.
d.

II

a.
b.
c.
d.

Exhibits accompanying this stipulation are:

a.
b.
c.
d.

Respectfully Submitted,

By Name – Title – Address – Telephone Number
(same for Union and General Counsel)

APPENDIX E

SUMMARY OF ULP DEFENSES

NOTE: All of these defenses are grounds for moving for the dismissal of the charge and/or complaint.

1. Other statutory appeal procedures exist to process the alleged matters.

2. 5 U.S.C. 7116(d) – a party cannot simultaneously process the same issue in different forms.

3. Satisfactory settlement offer was made.

4. There is no basis for complaint; e.g., the matter is not a ULP.

5. The charge is untimely; e.g., it was filed over 6 months from the date of event.

6. The issue(s) should be handled under the negotiated grievance and arbitration procedure.

7. Breach of Contract: there was no clear and patent breach of contract (e.g., the violation did not rise to a breach of contract).

8. Management was entrapped into committing the ULP.

9. Matter is *de minimis* and therefore was not prejudicial; e.g., matter was immediately corrected, no actual or reasonably foreseeable impact.

10. Since the complaint encompasses matters not in the charge, it is invalid.

11. The evidence is insufficient to establish a basis for the complaint.

12. The charge lacks specificity.

13. The FLRA has no jurisdiction - the matter is not a ULP.

14. Management acted reasonably and in good faith.

15. Failure to follow agency procedures is not a ULP.

16. The matter constitutes a management right.

17. The matter is controlled by agency policy for which there is a compelling need.

18. The matter is controlled by a subsequently passed law; e.g., after the fact, hearing.

19. The action would have been taken even if union animus was involved; e.g., a mixed motive case.

APPENDIX F

GUIDELINES FOR MANAGEMENT WITNESSES

1. Wear appropriate attire.

2. Tell the truth in respect to facts clearly and briefly. You will be under oath.

3. Tell what you know of the facts, not inferences. Speak up clearly and distinctly. Be sure the ALJ and the reporter hear you.

4. Listen to the questions carefully so that you will not try to answer before you know what has been asked. If you do not understand the question, ask the questioner to clarify it for you.

5. Try not to lose your temper or show strong personal feeling. You are at the hearing to give the trier the facts, not emotional pressure.

6. If the questioner gets overbearing or argumentative, let your representative object to such questioning and do not get argumentative or irritated.

7. Do not let the questioner on either side lead you into statements of facts of which you do not have full knowledge. The ALJ will draw his or her own inferences.

8. Do not volunteer information--just answer the question. Once the question is answered, remain quiet.

9. If you are asked if you have talked over your testimony with your representative, answer truthfully. You are expected to do this. This is the only proper way to decide whether to offer you as a witness or not.

10. If opposing counsel indicates he or she wants time to state an objection, keep still until he or she has spoken. To blurt out an answer in these circumstances is to invite suspicion of your good faith and reliability as a witness.

11. Do not try to testify to facts on a secondhand or "hearsay" basis.

12. There are times when facts will partly or completely pass from memory. Do not hesitate to say "I don't remember," if that is the truth. In many cases, regularly kept records or other memoranda may be used to supplement or revive the memory. Your counsel should be ready with these, when they can be used.

13. Do not write out a full statement of your expected testimony and plan to read it. Notes are normally not used.

14. Do not let a cross-examiner get you to make a "yes or no" answer unless it is correct. If you are sure the answer must be qualified, put your reply accordingly, and respectfully but firmly state that you do not believe the "yes or no" will be a truthful statement.

15. Do not talk to opposing parties before the hearing about your intended testimony. This forewarns them and may, with or without justification, open you to the charge that as a witness you have contradicted the statements you made in the prehearing conversations.

16. Be prompt in arriving at the place of hearing at the beginning and after each recess. If you are working and your shift ends before you are called to testify, do not leave the work area until you are assured that you will not be needed as a witness that day.

17. If you do not know the answer to a question, say so.

18. You are subject to cross-examination by the general counsel and questioning by the ALJ.

19. You may be sequestered--remain in or around the waiting area until you are called to testify.

20. If you are served with a subpoena, call your representative.

APPENDIX G

Management Post Hearing Brief Format

1. Caption parties and case number (see appendix D)
2. Background
   a. all background information—when the charge was filed, what actions occurred, notices of hearing, and when the hearing took place.
3. Management position on each of the *issues in complaint* (state as precisely as possible).
   a. rationale
   b. case precedent

4. Argument
   a.
   b.
   c.
   d.
   e. cite transcript by line number and page (e.g., TR L1-6, page 19) and relevant exhibits.

5. Conclusion—ask that the complaint be dismissed.

6. Footnotes can be used to identify case numbers and date of case decisions being cited; e.g., *NGB v xyz*, 26 FLRA 3000, 15 Jun 1987.

7. Attach service sheet (appendix J) and list all parties.

8. Serve by certified mail.

Dated this ___ day of _____, 1988

FOR THE RESPONDENT

_____

City, State, ZIP Code

_____

_____

Name, address, telephone number

APPENDIX H

Analysis of Administrative Law Judge's Recommended Decision

1. *CASE NAME*: DATE: _____

   CASE NUMBER:

2. *ALLEGATIONS OF COMPLAINT*:

3. *ALJ FINDINGS AND DECISION*:

4. ALJ RATIONAL FOR ADVERSE RULING:

5. EXCEPTIONS TO ALJ: (State grounds for filing or not filing exceptions).

_____
MANAGEMENT REPRESENTATIVE

Copy To:

APPENDIX I

Exception Brief Format

State National Guard
Respondent
and

UNION Local 1234
Charging Party

Case No._____

Management's Exception Brief
to the ALJ's Decision Dated_____

I. ALJ's findings and conclusions—citing transcript and page numbers.
II. Frame questions (issues) involved.
III. Grounds for exceptions.
IV. Brief in support of exceptions
   a. Argument
   b. Case precedent
   c. Legislative history (if any)
V. Conclusion
VI. Attach service sheet (appendix J)

Dated this ____ day of ____, 19__

FOR THE RESPONDENT

_____
(City, State, ZIP Code)

_____
_____
_____
Name, address, telephone number

APPENDIX J

Statement of Service **Case No:**

In the matter of (list respondent) and (list union) a copy of (*identify document*) dated _____was sent to the following by certified mail on_____:

List all parties served and address (If hand-carry or regular mail is used, so state). Certified Mail No._____

FOR THE RESPONDENT

_____
NAME

_____
ADDRESS

_____
TELEPHONE NUMBER

Dated this _____ Day of _____, 19__

_____
City, State, ZIP Code

APPENDIX K

Before The FLRA

State National Guard
Respondent
and
UNION Local 1234
Charging Party

Case No. *1 - 000 - 1111*

RESPONDENT'S ANSWER TO THE COMPLAINT AND NOTICE OF HEARING

1.-6. Admitted (1-6 refers to paragraphs in complaint)

7. Denied.

8. Denied.

9. Respondent is without knowledge.

Include service sheet (appendix J). Answer is served on the union, the Chief ALJ, and others designated in the complaint's service sheet.

FOR THE RESPONDENT

_____
NAME

_____
ADDRESS

_____
TELEPHONE NUMBER

Dated this _____ Day of _____, 19__

_____
City, State, ZIP Code

APPENDIX L

Position Statement Format
(Lieu of Formal Brief)

TO: Regional Director,
Region_____
ATTN:_____

REF: Case No.*1 - CA - 0000*

Dear Mr./Mrs. _____,

1. In reply to your letter of _____(Mr.)(Mrs.) will represent us in this case. All interviews, investigations and inquiries should be coordinated with (him)(her).

2. Statement of position (refer to enclosures). Be specific and concise.*Address the charge.*

3. " " "

4. " " "

5. If you require further information or would like to personally discuss this matter, please call.

Enclosures
FLRA Form 75 (Appendix C)
all relevant documents
(sanitize if necessary)

FOR THE RESPONDENT

_____
NAME

_____
ADDRESS

_____ _____
TELEPHONE NUMBER

Note: Need not be served on the union

APPENDIX M

Glossary

AFFIDAVIT – A written statement made under oath before an authorized individual which may or may not be notarized.

AMICUS BRIEF – A brief written by an interested party. Amicus status usually is approved in advance. This is a party who is not directly involved in the litigation.

ANSWER – Reflects a party's position on allegations contained in a complaint. Must admit, deny, or state without knowledge each allegation. Is filed by the respondent.

ARBITRATION – Usually refers to rights arbitration (contractual disputes). Interest arbitration (collective bargaining impasse) may occur with the concurrence of FSIP. Decisions are binding subject to appeal to the FLRA by the filing of exceptions.

AUTHENTICATION – Proven to be a reliable document usually by production of the original document.

BRIEF – A written statement of all facts, arguments, information, and precedent reflecting one side of a controversy.

BURDEN OF PROOF – That degree of evidence which causes a 3rd party to reasonably believe that a contention is true. Always rests with the general counsel (burden of persuasion).

CALENDAR CALL – Several (usually five or less) cases scheduled for hearing on the same date(s). The exact time of a hearing on a calendar call is unknown.

CHARGE – (FLRA Form 22 and 23) Allegation of a ULP which may be filed by unions, management, or individuals. The charge is investigated by the FLRA Regional Director. Usually must be filed within 6 months of the event(s) upon which the charge is based.

COMPLAINT – Issued by the FLRA Regional Director that defines the facts, issues, and hearing date of a ULP. Requires an answer by the respondent.

CROSS-EXAMINATION – To examine an opposing party's witness to impeach, disprove testimony, or elicit other facts.

DEFENSE – The method, proceedings, argument, and proof used in defending a party's position against a complaint.

DEPOSITION – A written statement under oath to be used in place of the physical presence of a witness.

DISCLAIMER – To renounce a legal claim or right; a disavowal.

EVIDENCE – Witness testimony, document, or objects offered in proof of the facts in issue.

EXAMINATION – Interrogation or questioning of a witness. See also cross-examination.

EXCEPTION – Filed pursuant to both a ULP-recommended decision of a ALJ and an arbitration award. If not filed, the decision or award will stand.

EXHIBIT – A document or article that is presented as evidence. Usually marked by the reporter. If rejected, the document is placed in the rejected exhibit file.

EX PARTE COMMUNICATION – Conduct (oral or written) from one side of a matter in dispute.

FEDERAL LABOR RELATIONS AUTHORITY (FLRA) – See 5 USC 7105. Sets LMR policy in the Federal program. Decides ULP's and arbitration exceptions. Final decisions are subject to court review under 5 USC 7123.

FORMAL PAPERS – Prepared by the General Counsel in a ULP hearing. Consists of the charge, position statement, complaint, answer, and any stipulations.

FOUNDATION – The basis or grounds for questioning.

FEDERAL SERVICE IMPASSES PANEL (FSIP) – Assists and resolves impasses resulting from collective bargaining. It is part of the FLRA.

GENERAL COUNSEL – Investigates, files, and prosecutes ULP charges and complaints.

GRIEVANCE – As defined in a collective bargaining agreement.

HEARSAY – Out of hearing statements, oral or written, which may be offered in evidence. If uncontradicted and persuasive, may meet burden of proof.

INTERROGATORY – Written questions issued by a party regarding a matter in controversy. Not normally usedw in ULP hearings but is provided for.

INTERVENOR – To become a party to a hearing. Requires ALJ approval.

ISSUE – A point(s) in dispute. Are defined in the complaint.

JENKS RULE – Rule permitting the production of a protected affidavit for purposes of cross-examination.

MIXED MOTIVE – Usually involved with cases concerning union animus. Management must prove by a preponderance of the evidence that the action would have been taken even if union animus was involved.

MOTION – A request for a ruling made to the Regional Director or ALJ; e.g., a motion for postponement.

NEGOTIABILITY – Involves whether or not a proposal is subject to collective bargaining because it violates law, rule, or regulation.

OBJECTION – To object; e.g., to object since the question is irrelevent or has previously been answered.

PAST PRACTICE – The manner in which parties have handled a matter. Must be known to both parties and have taken place over an extended period of time.

POSITION STATEMENT – Filed by the respondent with the FLRA Regional Director in response to a charge.

PRECEDENT – An authoritative rule or decision covering similar or related cases. Usually consists of FLRA, private sector, and court decisions but not non-precedential ALJ decisions.

PROBATIVE – A document or testimony affording proof or evidence.

REGIONAL DIRECTOR – Appointed by the FLRA. Determines bargaining units, conducts representation elections, ULP investigations, and provides for hearings.

RESPONDENT – Party whom a complaint is against.

SERVICE – A written statement showing who was served a brief or statement, how it was served, and the date. Usually by certified mail; must be signed.

SEQUESTER – To remove witnesses from a hearing room.

SETTLEMENT – To resolve a matter or portions thereof. Any party may initiate, orally or in writing. Usually reduced to writing.

SPECIFICITY – To state something in detail.

STAY – To temporarily suspend an order or decision.

STIPULATION – To agree to facts involving a matter in dispute

SUBPOENA – A writ to summon witnesses or documents.

SUMMARY JUDGMENT – To grant judgment in favor of a party after hearing evidence.

TRANSCRIPT (TR) – A typed verbatim record of testimony. May be purchased or examined at the FLRA Regional Director's office.